

28-12

No. 11,829

PETITION FOR REHEARING

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MITCHELL CAMERA CORPORATION,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

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Date: September 14, 1948.

FILED

SEP 20 1948

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The petitioner, Mitchell Camera Corporation, respectfully petitions the Court for a rehearing.

GROUND FOR THIS PETITION

The grounds of this petition are:

I. The decision is based upon the principles of *Dobson v. Commissioner*, which were repudiated by Congress.

II. The decision does not decide the issue of the applicability of the Administrative Procedure Act to this case.

ARGUMENT

The decision is based upon the principles of *Dobson v. Commissioner*, 320 U. S. 489 which were repudiated by Congress by Public Law No. 773, enacted on June 16, 1948 and approved by the President on June 25, 1948. It is true that

this amendment to the Judicial Code did not become effective until September 1, 1948, but its enactment was a recognition by Congress that the principles of the *Dobson* case were contrary to the original Congressional intent as to reviews by the Circuit Courts of Appeal of the decisions of the Tax Court of the United States.

It seem unfair and unjust that the petitioner should be prejudiced by a decision made after Congress had repudiated the principles upon which the Court based its decision and only eight days remained before the legal demise of the already repudiated principles. Such unfairness to this petitioner should have been avoided by a slight delay in the decision of the Court, or by a refusal to defeat justice by the application of principles of law already rejected by Congress.

Moreover, Public Law No. 773, repudiating the *Dobson* principle, has become effective prior to this Court's issuance of its mandate or remand of the case to the Tax Court. This court therefore retains "exclusive jurisdiction to review the [decision] of the Tax Court * * * in the same manner and to the same extent as decisions of the District Court in civil actions tried without a jury" as provided for in that statute, and has a duty to do so. Accordingly, no mandate based on the *Dobson* principle should now be issued, but instead a rehearing should be granted and the decision of the Tax Court reviewed in accordance with Public Law No. 773.

The arguments that the procedure in the Tax Court and the review of the case by this Court are governed by the Administrative Procedure Act are not referred to in the Court's opinion. As these questions are pending before the Court in the *Kennedy Name Plate Co. v. Commissioner of Internal Revenue*, decision should have been deferred in this case pending the decision of the Court in the *Kennedy Name Plate* case, or the issue should have been decided in

this case. It is clear that the Administrative Procedure Act is applicable to the Tax Court for the reasons stated in petitioner's brief pp. 38 to 46, and the Circuit Court of Appeals for the Sixth Circuit so held in *Lincoln Electric Co. v. Commissioner*, 162 F (2d) 379 and *Dawson v. Commissioner*, 163 F (2d) 664.

A rehearing is respectfully requested.

Respectfully submitted.

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